IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. G. RANDALL BRATTON, GARY G. BRATTON, BRATTON FINANCIAL SERVICES CORPORATION, and BRATTON INTERNATIONAL, INC., Defendants.	No. C04-0081 **REPORT AND RECOMMENDATION**

This matter comes before the court pursuant to the following motions:

1. Defendants' August 30, 2004 motion to dismiss pursuant to the doctrine of forum non conveniens or, alternatively, to transfer venue to the United States District Court for the Western District of Tennessee, Memphis Division (docket number 12).

2. Defendants' September 7, 2004 motion to stay or, alternatively, to extend time to respond to plaintiff's complaint (docket number 17).

3. Plaintiff's September 9, 2004 motion for entry of default pursuant to Fed. R. Civ. P. 55(a) (docket number 19).

4. Defendants' September 21, 2004 motion to dismiss for lack of subject matter jurisdiction and request for evidentiary hearing (docket number 24).

This matter was referred to the undersigned United States Magistrate Judge for issuance of a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). The undersigned recommends that defendants' motions to dismiss and/or transfer venue be denied, as well as plaintiff's motion for entry of default (docket numbers 12, 24, and 19, respectively). Defendants' motion for an extension of time in which to respond to

plaintiff's complaint (docket number 17) is granted. Defendants' responsive pleading shall be filed no later than twenty (20) days following a ruling by Judge Reade on the above-listed motions.

I. FACTUAL/PROCEDURAL BACKGROUND[1]

In November of 2002, the Brattons met with WRL President Mike Kirby at WRL's office in Florida so that the Brattons could become authorized agents to sell WRL's insurance products. G. Randall Bratton signed an "Appointment Agreement" on November 1, 2002. Gary G. Bratton signed an "Appointment Agreement" on July 2, 2003. The "re-branding" and marketing of certain AEGON Financial Group fixed life insurance products for WRL was also discussed during this November 2002 meeting. Correspondence was exchanged following this meeting regarding the possibility of the Brattons representing WRL as a national distributor for its "new" fixed life products. On January 15, 2003, various WRL executives met with the Brattons in Memphis, Tennessee to further discuss the possibility of the Brattons becoming a national distributer for WRL's fixed life products. Again, correspondence followed this meeting which set forth the parties' plans for introducing and selling these new products, and a conference call was conducted to discuss the details of the WRL/Bratton relationship. In August 2003, meetings were held at WRL's Cedar Rapids office and attended by the Brattons. The Brattons began taking steps and expending monies to market WRL's new fixed life products, including an advertisement in the November edition of a national life insurance trade publication, which was distributed at a convention.

[1]For ease of reference, the plaintiff in this matter will be referred to as "WRL." The defendants will be referred to collectively as "the Brattons." The "facts" as set forth in this report and recommendation are based upon the parties' complaints, affidavits, and exhibits attached to their moving papers.

On March 18, 2004, WRL notified the Brattons in writing that it was terminating their contracts.[2] On April 26, 2004, the Brattons' counsel sent correspondence to WRL outlining the Brattons' potential legal claims against WRL as a result of WRL's termination of the business relationship, and inquiring whether WRL would be amenable to discussing an out-of-court resolution. On June 11, 2004, WRL's in-house counsel, Andrew W. Martin, responded to the Brattons' letter, stating WRL's position that the Brattons' threatened claims lacked merit. On June 16, 2004, the Brattons' counsel responded, inquiring whether Mr. Martin would accept service of process on behalf of WRL. The Brattons sent another letter to WRL dated June 25, 2004. WRL filed its declaratory judgment complaint in this court on June 26, 2004 (the "Iowa" lawsuit). The Bratton were served with the Iowa lawsuit on June 30, 2004. On July 23, 2004, the Brattons filed suit against WRL in the United States District Court for the Western District of Tennessee alleging breach of contract, negligent misrepresentation, actual misrepresentation, promissory estoppel and unjust enrichment (the "Tennessee" lawsuit). The Brattons' Tennessee lawsuit seeks damages of not less than $50,000,000.

II. THE BRATTONS' MOTION TO DISMISS/TRANSFER

The Brattons move to dismiss the Iowa lawsuit pursuant to the forum non conveniens doctrine. Alternatively, the Brattons seek to have the Iowa lawsuit transferred to the Western District of Tennessee pursuant to 28 U.S.C. § 1404(a). According to the Brattons, defending the Iowa lawsuit would be oppressive and vexing out of all proportion to WRL's convenience. Specifically, the Brattons claim that dismissal or transfer of the Iowa lawsuit is warranted as their witnesses and documents are located in Tennessee and many of their witnesses have personal and professional commitments that would make it difficult, if not impossible, to attend a lengthy trial in Iowa. The Brattons also argue that defending the Iowa lawsuit would be financially prohibitive to their small family-owned

[2]The Brattons' "Appointment Agreements" contained a provision which allowed either party to terminate the agreement, without cause, on 30 days written notice.

business, and that the Iowa lawsuit is nothing more than WRL winning the race to the courthouse to effectuate forum shopping. Finally, the Brattons claim that the Western District of Tennessee has a superior interest in adjudicating the parties' dispute because it involves residents of its district.

WRL resists the Brattons' motion to dismiss or transfer, relying on the first-filed rule. Regarding the Brattons' motion to dismiss, WRL argues that the forum non conveniens doctrine is inapplicable as an alternate forum, i.e., the Western District of Tennessee, could properly hear the case. With respect to the Brattons' transfer motion, WRL argues that it would be equally inconvenienced by the Tennessee lawsuit as its witnesses and documents are in Cedar Rapids. WRL further argues that transferring this case to the Western District of Tennessee would be improper as the "conduct complained of" occurred in Iowa and that Iowa law governs this dispute pursuant to the appointment agreements.

A. The First-Filed Rule

"The well-established rule is that in cases of concurrent jurisdiction, 'the first court in which jurisdiction attaches has priority to consider the case.'" Northwest Airlines, Inc. v. American Airlines, Inc., 989 F.2d 1002, 1005 (8th Cir. 1993) (quoting Orthman v. Apple River Campground Inc., 765 F.2d 119, 121 (8th Cir. 1985)). The "first-filed" rule, however, is not to be applied in a "rigid, mechanical, or inflexible" manner, but instead should be applied in a manner which best serves the interests of justice. Id. Absent "compelling circumstances," however, the first-filed rule should apply. Id. (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982)).

The Eighth Circuit Court of Appeals has identified two "red flags" which may constitute "compelling circumstances" so as to deviate from the first-filed rule. Id. at 1006. The first "red flag" is whether the first-filer was on notice that the second-filer's lawsuit was imminent. Id. The second is whether the first-filed action is one for

declaratory judgment, as such an action may indicate a preemptive strike by the first-filer. Id. Other circumstances which the Eighth Circuit has recognized as sufficient to overcome the first-filed rule are: (1) where the first-filer was able to file first only because it misled the second-filer as to its intention to file suit in order to gain the advantage of filing first; and (2) where the second-filed action is a continuation of a legal process already begun in that court. United States Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487, 489 (8th Cir. 1990).

Another exception to the "first-filed" rule is the "balance of convenience" exception, which involves analysis of the factors relevant in deciding a motion to transfer pursuant to 28 U.S.C. § 1404(a). Brower v. Flint Ink Corp., 865 F. Supp. 564, 567-68 (N.D. Iowa 1994). These factors include, but are not limited to, (1) the convenience of the parties, (2) the convenience of the witnesses, including the willingness of witnesses to appear, the ability to subpoena unwilling witnesses, and the (in)adequacy of deposition testimony at trial in lieu of live witnesses, (3) the accessibility to records and documents, (4) the location where the conduct complained of occurred, 5) the applicability of each forum state's substantive law, (6) judicial economy, (7) the plaintiff's choice of forum, (8) the comparative costs of litigation in the competing forums, (9) each side's ability to enforce a judgment, (10) obstacles to a fair trial, (11) conflict of law issues, and (12) the advantages of a local court applying local law. Terra Int'l, Inc. v. Mississippi Chem. Corp., 119 F.3d 688, 696 (8th Cir. 1997) (citing Terra Int'l, Inc. v. Mississippi Chem. Corp., 922 F. Supp. 1334, 1357-63 (N.D. Iowa 1996)). "However, '[i]n any determination of a motion to transfer under § 1404(a), the plaintiff's choice of a proper forum is entitled to great weight, and will not be lightly disturbed, especially where the plaintiff is a resident of the judicial district in which the suit is brought.'" Brower, 865 F. Supp. at 567-68 (quoting Houk v. Kimberly-Clark Corp., 613 F. Supp. 923, 927 (W.D. Mo. 1985)). A transfer which merely shifts the inconvenience from one party to another does not warrant deviation from the first-filed rule. Id.

1. Compelling Circumstances

WRL was on notice pursuant to the Brattons' April 26, 2004 letter that, absent a negotiated resolution, litigation was a threat. WRL's June 11, 2004 response was clear, however, that WRL was not interested in entering into settlement negotiations and that WRL believed that any lawsuit the Brattons' may file would be frivolous. See Northwest Airlines, Inc., 989 F.2d at 1007 (noting that declaratory judgment plaintiff's response to defendant's letter, which was nothing more than "blowing smoke" about a potential lawsuit, made clear that the plaintiff disagreed with defendant's legal analysis of the merits of a possible lawsuit). WRL did not respond to the Brattons' June 16, 2004 letter inquiring whether its Assistant General Counsel was authorized to accept service on behalf of WRL. Instead, ten (10) days later, WRL filed its Iowa lawsuit, which the Brattons were served on June 30, 2004. Just over three weeks later, on July 23, 2004, the Brattons filed their Tennessee lawsuit.

The Brattons were not misled as to WRL's intentions regarding the dispute, or deceptively lulled into waiting to file their Tennessee lawsuit. The Brattons first threatened litigation against WRL in late April 2004, but did not file their lawsuit until nearly three months later, some three weeks after being served with the Iowa lawsuit. The Tennessee lawsuit is not a continuation of an already-filed lawsuit there. While the Iowa lawsuit does seek declaratory judgment, WRL is not required to wait indefinitely to be sued and have the dispute resolved in the Brattons' chosen forum. Brower, 865 F. Supp. at 572.[3] There

[3]In this respect, the present case distinguishable from Koch Eng'g Co., Inc. v. Monsanto Co., 621 F. Supp. 1204 (E.D. Mo. 1985), in which the plaintiff filed its declaratory judgment action following two years of settlement negotiations and there were no allegations of any continuing damages. In Koch, the district court found that its refusal to entertain the first-filed declaratory judgment action would not frustrate the purpose of the Declaratory Judgment Act, which is to "afford one threatened with liability an early adjudication without waiting until his adversary should see fit to begin an action after the damage has accrued." Id. at 1206-07. In this case, the damages sought by the Brattons (continued…)

is no evidence of bad faith on WRL's part in filing the Iowa lawsuit. In sum, the court finds these circumstances insufficiently "compelling" to deviate from the first-filed rule.

2. The Balance of Convenience Exception

The "balance of convenience" factors, as applied to the facts of this case, are a wash. Just as the Brattons and their witnesses would be inconvenienced by the Iowa lawsuit, WRL and its witnesses would be inconvenienced by the Tennessee lawsuit. Just as the Brattons' records and documents are located in Tennessee, WRL's documentary evidence is here in Iowa. Med-Tech Iowa, Inc. v. Nomos Corp., 76 F. Supp. 2d 962, 971 (N.D. Iowa 1999) (finding the "balance of convenience" exception inapplicable where the transfer of the case would merely shift the inconvenience from one party to the other). Moreover, the Brattons' claims that litigating the Iowa lawsuit would be financially prohibitive do not sway the court's decision. Whether it is couched in WRL's declaratory judgment action or the Brattons' counterclaims, the parties' dispute involves the same facts, witnesses, and evidence, and this court is capable of applying either Iowa or Tennessee law to same.[4] The court therefore finds inapplicable the "balance of convenience" exception to the first-filed rule. Accordingly, the Brattons' motion to transfer pursuant to 28 U.S.C. § 1404(a) should be denied.

B. Forum Non Conveniens

"The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). The doctrine of forum non

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[3](…continued)
in their Tennessee lawsuit are continuing in nature and WRL has properly sought an early adjudication instead of merely winning the race to the courthouse.

[4]There is some discussion regarding the proper applicable substantive law in the parties' moving papers, i.e., Iowa v. Tennessee. As that question is not presently before the court, no ruling is made on same as this factor is deemed to be not determinative in deciding the Brattons' motions to dismiss or transfer.

conveniens presupposes at least two forums in which the defendant is amenable to process, and provides criteria to be used in choosing between them. Id. at 506-507.[5] However, as a result of the enactment of 28 U.S.C. § 1404(a), which gives district courts more discretion to "transfer . . . than they had to dismiss on grounds of forum non conveniens," the forum non conveniens doctrine applies only in cases where the alternative forum is abroad. American Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994) (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981)).

Clearly there exists an alternate federal forum to hear this dispute, i.e, the Western District of Tennessee. As such, dismissal under the forum non conveniens doctrine would be improper. Application of the forum non convenience factors would lead this court to no different result. Defendants' motion to dismiss pursuant to the forum non conveniens doctrine should be denied.

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[5]Relevant factors include the relative ease of access to sources of proof, availability of compulsory attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses, the possibility of viewing any premises at issue in the case, and all other practical problems that make trial of a case easy, expeditious and expensive. Gilbert, 330 U.S. at 508. Public concerns to be considered include administrative difficulties arising from court congestion, the interest of a community in deciding local controversies, the interest in having a trial in a forum that is at home with the governing law, avoiding conflict of laws problems, requiring a court to decipher and apply foreign law, and burdening the citizens of an unrelated forum with jury duty. Id. at 508-09. In balancing these interests, the court must give considerable, but not conclusive, weight to the plaintiffs' choice of forum. Pain, 637 F.2d at 783. "Thus, the plaintiff's choice of forum is more than just one factor that the trial judge must consider when balancing equities between two alternative forums." Id. "[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255, 102 S. Ct. 252, 266 (1981). See also Gilbert, 330 U.S. at 508, 67 S. Ct. at 843 ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

III. THE BRATTONS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

On September 21, 2004, the Brattons filed a motion to dismiss for lack of subject matter jurisdiction and requested an evidentiary hearing (docket number 24). Specifically, the Brattons argue that WRL has failed to sustain its burden, both facially and factually, of establishing that the amount in controversy exceeds $75,000 as required for diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). WRL resists the Brattons' motion, arguing that the object of the litigation exceeds the $75,000 amount in controversy requirement for diversity jurisdiction.

The jurisdictional basis of WRL's declaratory judgment complaint is found in 28 U.S.C. § 1332 which provides, in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between - (1) citizens of different States.

28 U.S.C. § 1332(a)(1).

"[A] complaint that alleges the jurisdictional amount in good faith will suffice to confer jurisdiction, but the complaint will be dismissed if it 'appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount.'" Larkin v. Brown, 41 F.3d 387, 388 (8th Cir. 1994) (quoting St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938)). If challenged, the plaintiff must prove jurisdiction by a preponderance of the evidence. Kopp v. Kopp,380 F.3d 883, 884 (8th Cir. 2002). Thus, the $75,000 amount in controversy requirement is satisfied if a "fact finder could legally conclude, from the pleadings and proof adduced to the court before trial, that the damages that the plaintiff suffered are greater than $75,000." Id. at 885. In declaratory judgment actions, "it is well established that the amount in controversy is measured by the value of the object of the litigation." Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 346 (1977) (citing, among others, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 181 (1936)). "The amount in controversy is tested by the value of the suit's intended

benefit to the plaintiff," the "plaintiff's viewpoint" rule. Massachusetts State Pharm. Ass'n v. Federal Prescription Serv., Inc., 431 F.2d 130, 132 (8th Cir. 1970).

The Brattons have challenged the subject matter jurisdiction of this court both with respect to the facial allegations of WRL's complaint and to the factual truthfulness of same. "In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993). Fed. R. Civ. P. 8(a)(1) requires "a short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." In a factual attack, the court considers matters outside of the pleadings, i.e., affidavits, documents, and the like and, if necessary to determine the factual dispute, can hold an evidentiary hearing at which witnesses may testify. Osborn v. United States, 918 F.3d 724, 729-30 (8th Cir. 1990); Titus, 4 F.3d at 593.

WRL's complaint alleges that the "amount in controversy exceeds the jurisdictional limits required in 28 U.S.C. § 1332." This satisfies Fed. R. Civ. P. 8(a)(1). Moreover, the court finds that WRL has proven the factual basis for this court's jurisdiction by the preponderance of the evidence. It does not appear to a legal certainty that the amount in controversy is really for less than $75,000. An evidentiary hearing is unnecessary.

WRL's declaratory judgment action seeks a declaration that the written appointment agreements are the only contracts it entered into with the Brattons. The Brattons' Tennessee lawsuit alleges the existence of an oral contract in addition to the appointment agreements, WRL's breach of same, and resulting damage. Additionally, the Brattons seek recovery via their Tennessee lawsuit for unjust enrichment, negligent misrepresentation, actual misrepresentation, and promissory estoppel, all of which would be impacted by a declaration by this court that the written appointment agreements were,

in fact, the only contracts in existence between WRL and the Brattons.[6] Absent such a declaration, WRL may be facing liability of not less than $50,000,000 as set forth in the Brattons' Tennessee lawsuit. As such, the amount in controversy from WRL's viewpoint exceeds $75,000. See Capitol Indem. Corp. v. 1405 Assoc., Inc., 340 F.3d 547, 550 (8th Cir. 2003) (finding the "amount in controversy" requirement satisfied in insurance company's declaratory judgment action where the damages the plaintiff was seeking against the insured exceeded $75,000, which the insurance company would be liable for if the court declared that it did, in fact, have a duty to defend the insured); Modern Equip. Co. v. Continental Western Ins. Co., 146 F. Supp.2d 987, 992 (S.D. Iowa 2001) (holding insured declaratory judgment action to determine existence of coverage met the "amount in controversy" requirement for diversity jurisdiction where the plaintiffs were seeking in excess of $4.5 million in damages against the insured). Further, based upon the affidavit of Seth D. Miller, WRL's Vice President of Independent Producer Markets, a fact finder could conclude that the value to WRL of having its written appointment agreements declared exclusively controlling exceeds $75,000. The Brattons' motion to dismiss for lack of subject matter jurisdiction should be denied.

IV. WRL'S MOTION FOR ENTRY OF DEFAULT JUDGMENT

On September 9, 2004, WRL filed a motion for entry of default pursuant to Rule 55(a) (docket number 19). Fed. R. Civ. P. 55(a) provides:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

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[6]The court finds unpersuasive the Brattons' claim in its reply brief that the two appointment agreements are "unrelated" to the claims alleged in their Tennessee lawsuit. As previously stated, WRL's declaratory judgment action and the Brattons' Tennessee lawsuit involve the same business relationship gone awry, the same witnesses, underlying facts, documents, etc.

The Brattons have filed two separate motions to dismiss, one of which challenged (albeit unsuccessfully) the jurisdiction of this court. Two days before WRL's motion for entry of default was filed, the Brattons filed a motion to extend their time to respond to WRL's complaint until after their initial motion to dismiss was decided (docket number 17). Under these circumstances, entering default against the Brattons is not warranted. WRL's motion for entry of default (docket number 19) should be denied. The Brattons' motion for additional time to respond to WRL's complaint (docket number 17) is granted. The Brattons' answer to WRL's complaint shall be filed no later than 20 days from the date of a ruling on objections to this Report and Recommendation.

V. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections[7] to the Report and Recommendation within ten (10) days of its entry, that

1. The Brattons' motion to dismiss pursuant to the forum non conveniens doctrine or transfer pursuant to 28 U.S.C. § 1404(a) (docket number 12) be denied.

2. The Brattons' motion to dismiss for lack of subject matter jurisdiction (docket number 24) be denied.

3. WRL's motion for entry of default (docket number 19) be denied.

4. The Brattons' motion to extend time to respond to WRL's complaint (docket number 17) be granted. The Brattons' shall file their answer to WRL's complaint no later than 20 days from the date of a ruling on objections to this Report and Recommendation.

November 17, 2004.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT

[7] Any party who objects to this report and recommendation must serve and file specific, written objections within ten (10) court days from this date.